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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1982

BENEDICK A. MARSH,

Petitioner,

vs.

CITY OF OAKLAND, a
Municipal corporation,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Counsel for Petitioner

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit commit prejudicial error in affirming the judgment of the District Court for the Northern District of California which held that California Code of Civil Procedure Sec. 338(1), a three year statute of limitations was applicable to determine if Petitioner's cause of action under Title 42 U.S.C. Sec. 1983 was barred rather than the five year statute set forth in California Code of Civil Procedure Secs. 318 and 336?

2. Did the United States Court of Appeals for the Ninth Circuit commit prejudicial error in affirming the District Court's denial of Plaintiff/Petitioner's request for leave to amend his complaint before Defendant/Respondent had filed its answer in response thereto?

PARTIES

The parties to the proceedings below were Petitioner, BENEDICK A. MARSH, Plaintiff, and Defendant CITY OF OAKLAND, a municipal corporation, Respondent herein.

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No.

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October Term, 1982

BENEDICK A. MARSH,

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vs.

CITY OF OAKLAND, a
Municipal corporation,

Respondent.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, BENEDICK A. MARSH, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered March 31, 1983, in favor of Respondent and against Petitioner.

OPINIONS BELOW

Neither the opinion of the United States Court of Appeals nor that of the District Court is officially reported.

A copy of the opinion of the District Court is included herein as Appendix "A".

A copy of the opinion of the United States Court of Appeals is included herein as Appendix "B".

JURISDICTION

The jurisdiction of the District Court originally was invoked pursuant to U.S. Code Title 42, Section 1983 entitled Civil Action for Deprivation of Rights.

The judgment of the Court of Appeals was entered on March 31, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

U.S. Code Title 42, Section 1983 states as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." (Appendix "C")

In view of the fact that Title 42 U.S.C. Section 1983 does not set forth a statute of limitations, we must determine the same from California Code of Civil Procedure Sec. 338(1) attached hereto as Appendix "E", California Code of Civil Procedure Sec. 318, attached hereto as Appendix "F" and California Code of Civil Procedure Sec. 336, attached hereto as Appendix "G".

Jurisdiction herein is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

On March 20, 1982, Petitioner filed Action No. DC-83-1248 EFL in the United States District Court for the Northern District of California, against Respondent claiming damages for the wrongful condemnation of real property owned by Petitioner and his wife, GERALDINE MARSH, in violation of his civil rights by virtue of Title 42 U.S.C. Section 1983. A copy of said statute is attached hereto as Appendix "C".

In October, 1976, Petitioner MARSH and his said wife, were the owners in joint tenancy of that certain improved real property commonly known and designated as 4163-35th Avenue, Oakland, California. On October 26, 1976. Respondent, CITY OF OAKLAND, through its City Council, adopted a resolution to condemn the said real property of Petitioner and his wife, together with other real properties, located on said 35th Avenue in fee simple absolute for "public streets and

highway purposes".

In response to said resolution, Petitioner directed a letter to the Mayor and City Council of Respondent calling attention to the fact the under the applicable state law, an Environmental Impact Report must be filed with the proper state authority before such action should be undertaken (California Public Resources Code Section 21151. See Appendix D). Appellant is informed and believes that no such report was ever obtained.

Respondent, on December 27, 1976, filed Action No. 471106-7 in the Superior Court of the State of California, in and for the County of Alameda, against Petitioner and his wife for the condemnation of their said property. The Declaration of Service on file in said action states that GERALDINE MARSH was served on January 7, 1977 and Respondent, by substituted service, on January 26, 1977. Petitioner had no knowledge of said action as he had pre-

viously gone to Arizona and then Kentucky for reasons of health. Petitioner believes that his said wife was incompetent at the time of said service and incapable of understanding the significance of the legal documents which were served upon her. Petitioner had no knowledge of the action until long after judgment had been entered.

Defaults were entered against Petitioner and his said wife on September 29, 1977. On November 28, 1977, judgment was granted to Respondent ordering payment of \$48,000.00 to Petitioner and his said wife. The final order of condemnation was filed February 14, 1978 vesting fee simple title in Respondent.

Petitioner MARSH returned in the summer of 1978 and found that Respondent had removed his said wife from the said premises, had demolished the house situated thereon. Also, all of the furniture, furnishings and effects were missing. No ac-

counting of the disposition of said personal property was ever given Petitioner by Respondent herein.

Petitioner filed his action in said District Court under Title 42 U.S.C. Section 1983 for violation of his civil rights by reason of the wrongful taking of his property contrary to the "Due Process" clause of the XIV Amendment of the U.S. Constitution.

The District Court granted judgment of dismissal of Petitioner's cause of action and refused leave to amend on the following grounds even though Respondent had not as yet filed a responsive pleading.

1. The California Statute of Limitations of three years (California Code of Civil Procedure Sec. 338(1)) had run.

2. Petitioner could not cure the defect by amendment.

On appeal, the Ninth Circuit affirmed the judgment of the District Court on March 31, 1983. (No. 82-4352)

REASONS FOR GRANTING THE WRIT

U.S. Code Title 42 Section 1983 does not set forth a specific statute of limitations in respect to actions brought under said statute.

In Roseman v. Hassler, D.C. PA 1974, 382 F. Supp. 1328, affirmed 520 F₂ 1364, certiorari denied 96 S.Ct. 1128, 424 U.S. 921, the court held that the defense of the statute of limitations applies to actions for civil rights.

I. Application of Improper Statute of Limitations.

The problem created from the foregoing decision is that confusion results from the application of the state statutes. Many states have different time limits from othe states for the same cause of action. One state may have different limits for different types of civil rights violations. There is no uniformity in the enforcement of Sec. 1983. A person

may have a cause of action which is not barred in one state but would be if the same had accrued in another.

The Ninth Circuit in its decision affirming the judgment of the District Court, determined that civil rights is a liability created by statute and therefor subject to the California three-year limitation. In Shouse v. Pierce Co., 559 F₂ 1142, the court states as follows on page 1146:

"When we select the state statute from the available candidates we try to choose the statute which applies to those state actions and that are sufficiently generous in the time periods to preserve the remedial spirit of federal civil rights actions."

The Ninth Circuit, in its decision could have been "sufficiently generous" to have applied the five year statutes of California Code of Civil Procedure Sec. 336 which states:

"Within five years:

An action for mesne profits of

real property." (Appendix "F".)
or California Code of Civil Procedure Sec.
318 which states:

"No action for the recovery of real property or for the recovery of possession thereof, can be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the property in question, within five years before the commencement of the action." (Appendix "G".)

Actions involving real property (except for injury or simple trespass) as shown by the foregoing statutes have a limitation period of five years.

California Code of Civil Procedure
Sec. 338(1) provides as follows:

"Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture." (Appendix "E".)

Clearly, if Petitioner had wished to bring an action in the State of California for the reversal of the judgment of condemnation against him and the recovery of his

real property, he would have been allowed five years and not three.

A condemnation proceeding is not a liability created by statute. The power of the king to take property was known to the common law.

California appeal courts have held that the five year limitation statute is used in an inverse condemnation suit. In Garden Water Corporation v. Fambrough, 245 CA₂ 324, the California Court states on page 328:

"Acts constituting inverse condemnation amount to more than those of simple trespass. The former involve the taking or damaging of real property for a public use. When an act of trespass amounts to a taking or damaging for a public use it is more than a mere trespass on an interest in land, but it takes from the owner of the land something necessary and essential to the use and enjoyment of the property and thus results in the taking away of a valuable property right.

In the light of the foregoing persuasive analysis of the distinction between trespass and in-

verse condemnation resulting from the taking of real property, we hold that the trial court here correctly applied the five year statute of limitations to respondent's cross-complaint for damages resulting from inverse condemnation."

In Martin v. Western States Gas and Electric Co. 8 CA₂ 226, an action for the taking of water, the California Court held on page 230, as follows:

"It follows that the defendants; appropriation of the plaintiff's riparian right to water from the American River adjacent to his Riverton property constituted a taking and damaging of the real property contrary to the provisions of Article I, Section 14, of the Constitution of California, and the statutory limitation of time within which the owner thereof may recover damages thereof is not barred in three years, but the right of action for damages, under the circumstances of this case, does not expire short of the five years necessary for the defendants to have acquired title by adverse possession."

See also Podesto v. Linden Irrigation District, 141 CA₂ 35, 51.

The District Court, if it had fol-

lowed the doctrine set forth in Shouse, supra, should have applied the five year statute instead of the three.

II. Petitioner Should Have Been Granted Leave to Amend.

Petitioner filed his complaint in this action on March 30, 1982. A copy of the same, together with a copy of the summons, was thereafter served on Respondent, CITY OF OAKLAND. No amended complaint was ever filed. No responsive pleading was filed by said Respondent, but on or about April 20, 1982, said CITY OF OAKLAND filed a motion to dismiss which was set for hearing on May 21, 1982. At the time of said hearing, counsel for both parties appeared and argued the matter. The Court granted Respondent's motion and stated as shown by Reporter's Transcript on page 7, as follows:

"The Court: I'll grant the motion to dismiss.

Mr. Sea: May I have the opportunity to amend?

The Court: How are you going to

amend when you're beyond the statute? I mean--I mean my natural inclination is to say, fine, I'll let you amend, but how are you going to get within the statute?

Mr. Sea: I would like an opportunity, if I may."

The Court finally stated:

"I'll grant the motion to dismiss. I'll grant it without leave to amend."

Judgment in favor of Respondent was entered on June 7, 1982. Nothing was stated in the judgment as to the grounds for dismissal.

Breier v. Northern California Bowling Proprietors' Association, 316 F₂ 787 (9th Circuit 1963) is a case similar to the one at bar. Appellants filed complaints charging anti trust violations by appellees to fix prices. No answers were filed by appellees who did file a motion to dismiss for failure to state a claim. The court granted appellee's motion and denied leave to amend. The Circuit Court held on page 789, as follows:

"We think appellants were entitled to file amended complaints as a matter of right. 'A party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *' Rule 15(a) Fed. R. Civ. P. A motion to dismiss is not a 'responsive pleading' within the meaning of the Rule. Neither the filing nor the granting of such a motion before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper, and a motion for leave to amend (though unnecessary) must be granted if filed (citing cases)".

The Court further states on page 879:

"Even if the question had been addressed to the court's discretion, we think leave to amend should have been granted. The purpose of pleading under the Rules 'is to facilitate a proper decision on the merits' Conley v. Gibson, 335 US 41, 48, 78 S. Ct. 99, 2 L.ED. 2nd 80 (1957). To this end, Rule 15 was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result".

Breier, supra, also cites Foman v. Davis, 371 U.S. 178, 182, as authority.

In view of the law as set forth in Breier, supra, it would appear that the Court of

Appeals for the Ninth Circuit should have reversed the judgment of the District Court and given Petitioner the opportunity to amend.

CONCLUSION

In order to determine the conflict re-
the proper application of the various statutes of limitation of the several states in regard to Title 42 U.S.C. Sec 1983, and correct the departure of the Ninth Circuit from the usual course of judicial proceedings in refusing Petitioner leave to amend his complaint, Petitioner prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: May 31, 1983.

Respectfully submitted,

Donald M. Sea

DONALD M. SEA
Attorney for Petitioner

(Appendices follow)

C O P Y

APPENDIX A

ENTERED IN CIVIL DOCKET 6-7-1982

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William L. Whittaker
Clerk
U.S. DISTRICT COURT
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BENEDICK A. MARSH,)	
)	
Plaintiff,)	No. C 82-1248 EFL
)	
vs.)	<u>JUDGMENT</u>
)	
CITY OF OAKLAND, a)	
municipal corporation,)	
)	
Defendant.)	
)	

The Court having granted defendant's,
City of Oakland, motion to dismiss,

IT IS HEREBY ORDERED AND ADJUDGED that
judgment be entered for defendant.

Dated: ^{June 1,} ~~May 21,~~ 1982.

/S/ E. Lynch

EUGENE F. LYNCH
United States District Judge

C O P Y

A-2
APPENDEX B

F I L E D
MAR 31 1983
PHILLIP B. WINBERRY
Clerk, U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENEDICK A. MARSH,)	
)	No. 82-4352
Plaintiff-Appellant,)	
)	DC #CV-82-1248-EFL
v.)	
)	MEMORANDUM
CITY OF OAKLAND,)	
a municipal corporation,)	
)	
Defendant-Appellee.)	
)	

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding
Submitted March 9, 1983*

Before: SNEED, SCHROEDER, and FARRIS, Circuit
Judges.

Marsh appeals the district court's dismissal of his civil rights complaint.

The district court's judgment must be affirmed.

The three-year statute of limitations had run. Briley v. California, 564, F.2d 849,

854, (9th Cir. 1977), and the district court properly denied Marsh's request for leave to amend his complaint because Marsh could not cure the defect. Breier v. Northern California Bowling Proprietors' Ass'n, 316 F.2d 787, 789-90 (9th Cir. 1963).

Affirmed.

*The panel finds this case appropriate for submission without argument pursuant to 28 U.S.C.A. 9th Cir. R. 3(a) and Fed. R. App. P. 34(a).

APPENDIX C

TITLE 42, U.S.C., Section 1983.

Civil Action For Deprivation of Rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

APPENDIX D

CALIFORNIA PUBLIC RESOURCES CODE, Section

21151. Findings by Legislative Bodies
of Cities and Counties Having
General Plans: Reports by
Other Local Agencies.

"All local agencies shall prepare, or
cause to be prepared by contract, and cer-
tify the completion of an environmental im-
pact report on any project they intend to
carry out or approve which may have a sig-
nificant effect on the environment. . . ."

APPENDIX E

CALIFORNIA CODE OF CIVIL PROCEDURE, Section

338. Three Years - Statutory Suit,
Trespass, Trover, Fraud and Mis-
take, Official Bonds, Slander of
Title.

"Within three years:

1. An action upon a liability cre-
ated by statute, other than a penalty or
forfeiture."

APPENDIX F

CALIFORNIA CODE OF CIVIL PROCEDURE, Section
336. Five Years - Mesne Profits.

"Within five years:

An action for mesne profits of real
property."

APPENDIX G

CALIFORNIA CODE OF CIVIL PROCEDURE, Section

318. Five Years - Possessory Action.

"No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action."

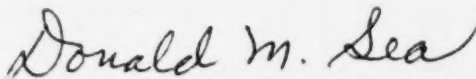
CERTIFICATE OF SERVICE

I certify that I am the counsel for Petitioner in the above-entitled matter and that I served three (3) copies of the foregoing petition upon counsel for Respondent by mailing the same to them by first class mail, postage prepaid this 9th day of June, 1983, as follows:

For CITY OF OAKLAND

RICHARD E. WINNIE, City Attorney

PETER K. FINCK, Deputy City Attorney
503 City Hall, 1421 Washington St.
Oakland, California 94612



DONALD M. SEA